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95-239

No. 95-

Supreme Court, U.S.
FILED
SEP 11 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, and H.O.M.E., INC.,

Petitioners,

-v.-

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., and ALBERT MOORE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE OHIO HUMAN RIGHTS BAR ASSOCIATION, THE LEAGUE OF WOMEN VOTERS OF THE CINCINNATI AREA, LOG CABIN REPUBLICANS, AND THE ANTI-DEFAMATION LEAGUE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI

The Ohio Human Rights Bar Association (OHRBA) is a state-wide bar association dedicated to improving the legal rights of lesbians, gay men and bisexuals and to educational and litigation programs that will accomplish that end. OHRBA has participated as amicus in the lower court in this case and has similarly participated in other lawsuits affecting gay and lesbian citizens in Ohio.

The League of Women Voters of the Cincinnati Area is an Ohio not-for-profit corporation and a grass roots, non-partisan political organization that seeks to encourage the informed and active participation of citizens in government and to influence public policy through education and advocacy, including advocating public policies that protect basic human rights. The League has participated as amicus in various lawsuits affecting human rights.

Log Cabin Republicans (LCR) is the nation's largest partisan organization representing gay and lesbian individuals, with 43 chapters in 35 states and over 10,000 members. Log Cabin Federation of Ohio is a chartered chapter of LCR with members from across the state of Ohio. As part of its mission, LCR strongly supports efforts to ensure the full constitutional rights of gay and lesbian Americans, including the right to petition their government.

The Anti-Defamation League (ADL) is one of the oldest civil rights organizations in the United States. It was founded in 1913 to combat anti-Semitism and to promote good will among all races, ethnic groups and religions. As set forth in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." For more than eighty years, ADL has been active in the fight against discrimination in employment, housing, education and public accomodations.

SUMMARY OF THE ARGUMENT

This Court has already undertaken in *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995), the task of determining whether Amendment 2 to the Colorado Constitution violates the Equal Protection Clause of Fourteenth Amendment to the United States Constitution. In *Romer*, the state courts addressed whether Amendment 2 impermissibly burdens a fundamental right to equal political participation but did not address whether the measure is supported by a rational basis.

Certiorari is particularly warranted in this case, which challenges a nearly identical amendment to the Cincinnati Charter, because both the United States District Court and Sixth Circuit Court of Appeals fully addressed *both* the rational basis and fundamental rights theories of relief and the District Court made detailed findings of fact. For example, both Amendment 2 and Issue 3 use the phrase "homosexual, lesbian, or bisexual orientation..." but only in the instant case did the trial court undertake to define sexual orientation and determine that the classification based on sexual orientation in Issue 3 reflected private prejudice and was too attenuated to any legitimate governmental interest in its application of the rational basis test.

The Sixth Circuit, in an erroneous and controversial move, rejected the trial court's analysis of all issues and applied *de novo* review to all factual and legal conclusions. Accepting *certiorari* and permitting full argument in this case (in addition to *Romer*) will guarantee full consideration during this Supreme Court term of the many factual and legal issues that properly underlie rational basis review.

Amici organizations urge a rule of law that reflects trust in the democratic political process. Federal Courts have a limited but important role in that regard. Federal Courts

nurture that trust by insuring access to a level playing field. Issue 3 denies to lesbian and gay voters a level playing field. The measure denies to them the ability to seek protection through politics from the abuse of both public and private discrimination. Issue 3 targets a specific group of voters and expressly excludes them from seeking equal protection of the laws - even in the face of a proven need for protection - from their representatives in government. Issue 3 is therefore a violation of the constitutional guarantee of "equal protection of the laws".

The express purpose of Issue 3 is to restrict gay political influence and to enhance the political power of the majority voters. This is not a legitimate governmental purpose. No rational basis exists that can justify excluding gay, lesbian and bisexual citizens - and no others - from seeking civil rights protection or other redress for harm. The sweeping Sixth Circuit ruling ignores the detailed findings of fact of the trial court and fails to follow the rational basis precedents of this Court. The decision has set the stage for measures similar to Issue 3 that can be directed against any unpopular minority group. The issue is ripe for review by this Court under a rational basis standard as well as the heightened scrutiny for violations of fundamental rights urged in *Romer* and by the petitioners in this case.

ARGUMENT

I. ACCEPTANCE OF THIS CASE FOR REVIEW AND ARGUMENT IN ADDITION TO ROMER WILL BRING LOWER COURT RULINGS ON RATIONAL BASIS BEFORE THIS COURT AND THEREBY INSURE FULL CONSIDERATION OF ALL RELEVANT FACTS AND ARGUMENTS BEARING ON THESE ANTI-GAY AMENDMENTS

The amici organizations urge that this Court grant *certiorari* in this case in order to fully consider - with the assistance of broader lower court rulings - the issues already scheduled for plenary review in *Evans v. Romer*. Based on the question presented in *Romer*, the parties have briefed two theories of relief: that Amendment 2 (1) violates the fundamental right of equal political participation; and (2) has no rational basis. The rulings at the trial and appellate levels in the state courts in *Romer*, however, only specifically addressed the political participation theory.

Significantly, the trial court in this federal action made factual findings and conclusions of law under both theories. The Sixth Circuit Court of Appeals also addressed both theories. Thus, by accepting this case for plenary review, this Court in a single term, will have the opportunity to explore fully the factual findings as well as the legal analysis based on those findings on this issue of national concern.

The Sixth Circuit's opinion represents the first federal appellate ruling -- and the first ruling nationwide - upholding a measure that restricts the rights of lesbian and gay citizens to seek civil rights protection through the political process. If left unchanged, the holding of this sweeping decision will support official discrimination against lesbian and gay citizens in

government programs, educational institutions and civil service jobs as well as in private housing, employment and public accommodations. Indeed, the Sixth Circuit decision has been compared to another case that served to promote and legitimize rather than reduce discrimination against another minority, *Plessy v. Ferguson*, 163 U.S. 256 (1896) (upholding racially segregated public accommodations). Further, among the membership of the amici organizations are persons of Appalachian heritage, single mothers, older people and people of many religious traditions that do not have protection against discrimination in all settings under existing federal and state law. The Sixth Circuit ruling could put at risk any of these minority groups should a measure structured like Issue 3 target their ability to seek protection from discrimination and other wrongdoing.

II. ISSUE 3 BURDENS PETITIONERS' FUNDAMENTAL RIGHT OF POLITICAL PARTICIPATION BY DENYING EQUAL ACCESS TO THE POLITICAL PROCESS

Amici organizations claim no right to the realization of any political objectives. Indeed, the petitioners and amici seek only a level playing field. Like all other citizens, they deserve access on an equal basis to the decision making process. Issue 3 denies that equal access.

Changing the very structure of the political process solely to empower majority voters and reduce the power of targeted minority voters violates the essence of our democratic system confined, as it must be, by an overarching respect for the constitutional rights of its citizens. Further, the fact that Issue 3 is itself the result of a citizen initiative lends it no extra protection:

> One's right to life, liberty and property...and other fundamental rights may not be

> submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943). Moreover, close judicial scrutiny should be given to any "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938).

The Sixth Circuit failed to follow this Court's rulings in *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Hunter v. Erickson*, 393 U.S. 385 (1969). Like Issue 3, the Akron charter amendment at issue in *Hunter* was adopted by a majority of the city's voters, repealed existing discrimination protections, and required those in need of such laws to win a majority in another popular vote before any such measure could be implemented. The amendment was struck down because it unjustifiably imposed the higher burden for securing new discrimination laws on a small identifiable group:

> Only laws to end housing discrimination on "*race, color, religion, national origin, or ancestry*" must run [the amendment's] gauntlet... [The amendment] disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations ... [Government] may no more disadvantage *any particular group* by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any group smaller representation than another of comparable size.

Id. at 390-91, 393 (emphasis added).

The Sixth Circuit improperly limited the *Hunter* holding to the racial context. *Hunter* actually supports a broader principle of equal political participation. A measure "enacted with the purpose of assisting one group in its struggle with its political opponents," rather than for a neutral purpose commands strict scrutiny. *Id.* (Harlan, J., concurring). In this regard *Hunter* is consistent with other decisions from this Court which recognize the need to protect equal access to all levels of representative government. *Reynolds v. Sims*, 377 U.S. 533 (1964) (Alabama ordered to reapportion statelegislature as system in place unfairly diluted votes of urban citizens); *Washington v. Seattle District No. 1*, 458 U.S. 457, 470 (1982) (anti-busing initiative invalid because it did not "allocate governmental power on the basis of any general principle").

These same neutral principles are reflected in *Gordon v. Lance*, 403 U.S. 1 (1971), in which this Court upheld a requirement that tax increases and bonded indebtedness be first approved by 60% of the voters. The supermajority requirement affected *all* persons seeking to raise taxes, and did not target any one group. Significantly, this Court distinguished *Hunter* noting that the Akron amendment did single out an independently identifiable group:

> The class singled out in *Hunter* was clear -- "those who would benefit from laws banning racial, religious, or ancestral discriminations." In contrast *we can discern no independently identifiable group or category that favors bonded indebtedness* over other forms of financing. Consequently no sector of the population may be said to be "fenced out" from the franchise because of the way they will vote.... We conclude that so long as such provisions do not discriminate against or authorize discrimination against *any identifiable class*

> they do not violate the Equal Protection Clause.

Gordon, 403 U.S. at 5, 7 (emphasis added). *Hunter* was, therefore, not explained in *Gordon* solely as a case drawing a racial classification and the Sixth Circuit was wrong to limit the reach of *Hunter* to legislation drawing racial distinctions.

The Sixth Circuit also erred in the application of *Hunter* to these facts because it viewed Issue 3 as impacting on an "unidentifiable and non-protected class of homosexuals and their allies". Pet. App. 18a. The Court, in a related passage explained that "homosexuals generally are not identifiable 'on sight'" and further stated that:

> [N]o law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts. Those persons having a homosexual 'orientation' simply do not as such comprise an identifiable class.

Pet. App. 13a. No "visibility" test is consistent with this Court's ruling in *Hunter*. This Court must accept *certiorari* and prevent such reasoning from threatening the rights of petitioners as well as other minorities - e.g., divorced people, people with disabilities, older people, Jews - who are not always "visible." Indeed this Court has recognized that even race is not always visible and is not defined solely by appearance. *See St. Francis College v. Al-Khazraji*, 481 U.S. 5604, 610-613 & n.4 (1987).

Issue 3 is very similar to the Akron charter amendment struck down in *Hunter* because it restructures the local political process by taking only issues affecting a targeted class

of citizens - here, gay people -- out of the normal legislative process. This Court should accept *certiorari*, hear the case on its merits and cause Issue 3 to suffer the same fate as the Akron Charter Amendment and be struck down.

III. RESTRICTING GAY POLITICAL ACCESS IS AN IMPROPER GOVERNMENTAL PURPOSE; ISSUE 3 HAS NO RATIONAL BASIS.

The rational basis test requires a "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 113 S. Ct. 2637, 2642 (1993). A measure based upon a an illegitimate purpose such as prejudice toward a targeted group should not survive rational basis scrutiny:

> The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Palmore v. Sidoti, 466 U.S. 429, 431 (1984). Thus the presence of prejudice or other improper government purposes behind a classification does require an examination to determine if legitimate or illegitimate purposes actually support the measure. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448-450 (1985). The District Court held that Issue 3 reflected an improper purpose -- private prejudice. The Court of Appeals ignored that finding and then failed to examine whether the proffered governmental interests were a subterfuge for that prejudice. In so doing the Court of Appeals erred.

The District Court found that Issue 3 "does not target specific issues or types of problems that affect all citizens...[r]ather, Issue 3 targets specific citizens based upon

who they are." Pet. App. 44a-45a. The court held that Issue 3 reflects "private prejudice":

> Issue 3...is an affirmative declaration that gays, lesbians and bisexuals are unworthy of protection, now and in the future. It is a declaration that discrimination against them is permissible and that if they suffer discrimination at the hands of the majority, it is from the majority itself that they must seek help.

Pet. App. 76a. These findings were first based upon the text of Issue 3 itself and were further confirmed by the District Court's review of the historical record concerning Issue 3's introduction and passage. Pet. App. at 28a n.4, 60a, n. 16, 73a, 74a, and 76a. In reaching these determinations the court heard testimony from 20 witness, including 13 experts, and reviewed over 600 exhibits. The District Court found that "unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals" pervaded the presentations made by those promoting Issue 3. Pet. App. at 40a, n.7. The District Court concluded that Issue 3 reflects no legitimate governmental purpose; rather it represents "a bare desire to harm a politically unpopular group." Pet. App. 75a.

Examining the governmental purposes offered by Respondents to justify Issue 3, the District Court found that even those purposes that were legitimate in themselves were nonetheless "too attenuated" to justify Issue 3 under the rational basis test or any other equal protection scrutiny. Pet. App. 74-76a. No rational basis explained why lesbians, gay men and bisexuals alone were singled out in Issue 3. Moreover, uncontroverted evidence demonstrated that some asserted "goals" were simply not met by Issue 3. Government regulation was not reduced and no money was saved by the measure. Pet. App. 70a. The other stated purposes were actually alternative ways of supporting the measure as a

collective expression of public "morality" - a purpose firmly rejected by the trial court which could discern no uniform expression of morality in the Cincinnati community. The trial court also made clear that an invocation of "morality" cannot be accepted if it is a surrogate for prejudice, negative attitudes or fear of an unpopular group. Pet. App. 74a-76a.

The invocation of morality by the Respondents in this case also represents an appeal to the majority voters to institutionalize their majority political power. Restricting political access solely to preserve political power is an improper purpose. In *Carrington v. Rash*, 380 U.S. 89 (1965) this Court rejected Texas' refusal to permit soldiers to vote in certain elections. Soldiers upset the status quo in elections near large army bases and the state wanted to adjust the balance of power by simply restricting their exercise of the franchise. This Court refused to permit the state to "fence out" soldiers in order to protect the status quo.

Similar forces are at work behind Issue 3. The author of Issue 3 admitted that the real goal behind the measure was to hinder the political power of lesbians, gay men and bisexuals:

> What we have done was eliminate the ability for a well-funded powerful minority to effectuate legislation benefiting itself.

J.A. 457. The founder of Respondent ERNSR concurred:

> Ninety percent of the problem was the fact that the homosexuals...took over City Council and that they were going to start pushing their agenda through their elected officials. To me it had more to do with who was being elected to office...

Jt. Exhib. at 43. Indeed the petition drive to put Issue 3 on the ballot was pursued by "Take Back Cincinnati," an organization appealing to voters to "take back" the city from "homosexuals." Pltf. Ex. 2, at 7-11. The trial court accurately noted that "[a]ll citizens [deserve] the right to try to obtain legislation on their behalf on an equal footing with others." Pet. App. 53a. Justice Rehnquist, writing in dissent in *Anderson v. Celebreeze*, 460 U.S. 780, 817 (1983) (citations omitted), similarly noted that,

> A court's job is to ensure that the state in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life.

This restructuring of political access in Cincinnati for the purpose of empowering the majority at the expense of the gay and lesbian minority is an example of institutionalizing the tyranny of the majority against which James Madison warned in Federalist 10 and 51.

The Sixth Circuit gave no weight to any of the District Court's findings and declared that the entire matter was subject to a *de novo* review. The Sixth Circuit did note that the trial "generated extensive expert testimony reflecting the social, political, and economic standing of homosexuals throughout the nation and the homophobic discriminations that have been experienced by the individual plaintiffs and others." Pet. App. 6a. But the Sixth Circuit nonetheless refused to give any weight to the carefully crafted factual findings entered by the trial court. Labeling them "sociological judgments" and "ultimate facts", (Pet. App. 9a), the Court asserted that the *de novo* standard therefore applied. This Court has rejected such reasoning, especially in the context of equal protection. *See e.g. Hernandez v. New York*, 111 S. Ct. 1859, 1868 (1991) ("the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal") (citing cases). Under this

erroneous appellate standard, the Sixth Circuit went on to reverse every holding of the trial court while making very few references at all to the factual record.

Employing the "special rights" rhetoric of the anti-gay campaign to secure passage of Issue 3, the Sixth Circuit repeatedly labeled the protection from discrimination available to all persons regardless of their sexual orientation under the Human Rights Ordinance (HRO) as "special protection" for lesbians, gay men and bisexuals. See Pet. App. 10a, 14a, n.4, and 18a, n.8. The effect of Issue 3, according to the appellate court, was:

> to render futile the lobbying of Council for preferential enactments for homosexuals *qua* homosexuals because the electorate placed the enactment of such legislation beyond the scope of Council's authority.

Pet. App. 17a. Of course Issue 3 also prevents the passage of protective legislation in response to documented harms as well as "preferential enactments." The Court viewed Issue 3 as applicable to a "narrow spectrum of substantive issues." Pet. App. 18a. In essence, the Sixth Circuit agreed that the effect of Issue 3 was to target "homosexuals" and eliminate their ability to secure legislation and policies through the City Council and through city officers. However, the Sixth Circuit failed to recognize the anti-gay prejudice embodied in the measure. *Id.*

Again using the rhetoric of the anti-gay political forces (e.g., "homosexual lifestyle"), the appeals court held that:

> [Issue 3] did not punish or prohibit any aspect of the homosexual lifestyle and indeed did not compel the deprivation of anything from any person by the use of government

> power because of his or her sexual orientation.

Pet. App. 14a, n.4. This holding is simply not true. First, there is no such thing as, nor evidence in the record to identify a "homosexual lifestyle." Second, there was abundant evidence that Issue 3 would use government power to deprive lesbian and gay citizens of important protections. For example, the record clearly reveals that violence and discrimination against gay men and lesbians has been rampant in Cincinnati as it is nationwide. Jt. App. at 895-908, 909-961, 962-971, 1313-1324, 1438- 1472; Pltf. Ex. 393, 394. Other communities have passed legislation to address the problem of violence directed at people because of their sexual orientation. *See Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993); COLUMBUS, OHIO, ch. 2325 (1989). Issue 3 prohibits city council from passing and city administrators from enforcing such laws and therefore imposes a significant deprivation on lesbian, gay and bisexual citizens because of their sexual orientation.

The Sixth Circuit, by ignoring the findings of private prejudice, failed to anchor its analysis "in the realities of the subject matter addressed by the legislation," *Heller v. Doe by Doe*, 113 S. Ct. 2637, 2643 (1993), and improperly permitted Respondents to "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985) (recently reaffirmed in *Heller* at 2643); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973).

The Sixth Circuit completely failed to explain why it was rational to single out only lesbian, gay and bisexual citizens to serve the broad interests cited in support of the amendment.

For example, the court held that Issue 3 potentially "enhanced associational liberty" for those seeking to "disassociate themselves from homosexuals." *Id.* This rationale of hostility does not support the restrictions imposed by Issue 3 on the political rights of only this targeted group, which make it impossible for them and no others to obtain protection from documented harmful conduct. The Court also noted that Issue 3 returned the municipal policy regarding "homosexuality" to one of "neutrality." *Id.* With the passage of Issue 3, the existing city discrimination ordinances continued to protect heterosexuals but no longer protected lesbians, gay men and bisexuals. That is not a "neutral" policy. Pet. App. 44a, 73a.

The Court of Appeals additionally justified Issue 3 by citing potential reductions in "government regulation" and cost. Pet. App. 20a-21a. These conclusions erroneously ignore the findings of the District Court based on the unrebutted testimony of City enforcement officers and experts from other jurisdictions demonstrating that Issue 3 creates no decreased cost or regulatory savings. Pet. App. 70a-71a. More importantly, these conclusions fail to exlain why the measure singles out lesbians, gay men and bisexuals to serve these broad goals.

The Sixth Circuit further held that Issue 3 "augment[s]" the "personal autonomy" of those holding deep "religious convictions, and [convictions on] other profoundly personal and deeply fundamental moral issues". Pet. App. 20a. The Court noted that

> if the amendment is construed to reflect the majority's moral views respecting homosexuality, the Supreme Court has dictated such articulations to constitute a legitimate governmental interest.

Pet. App. 20a, n.10. The Sixth Circuit's reliance on this "morality" rationale represents a distortion and unwarranted extension of this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The question in *Hardwick* was whether the State of Georgia violated substantive due process by criminally prosecuting sodomy. The question in this case is whether restricting gay men, lesbians and bisexuals from political access violates their right to equal protection. Indeed, Ohio and Cincinnati do not have sodomy laws or other criminal laws remotely similar to those in *Hardwick*. That decision simply cannot be stretched to support the restriction on political rights at stake in Issue 3.

Issue 3 has no legitimate governmental purpose and is too attenuated to the few legitimate purposes that might be cited on its behalf. The Sixth Circuit's error in affirming the measure against the rational basis challenge is a dangerous precedent that could weaken the rights of many other minority groups who are not "obvious," but who heretofore have been granted equal protection of the laws.

The Sixth Circuit completely failed to address the District Court's central finding that Issue 3 legislates private prejudice. Further, the Court of Appeals failed to explain the rational basis for singling out lesbian, gay and bisexual people to serve the government interests cited in support of Issue 3. This Court should accept *certiorari* to demonstrate the proper analysis to be used in this context as well as the proper result. Issue 3 is unconstitutional and has no rational basis.

CONCLUSION

This Court is facing important questions in the *Romer* case regarding the rights of equal political participation under the Equal Protection Clause. The parties in *Romer* have also briefed the rational basis issue. This case raises the same questions and provides the substantial benefit of rulings by lower courts under the rational basis standard for review. This petition for *certiorari* should therefore be granted, the decision of the Sixth Circuit reversed, and the trial court decision reinstated.

Respectfully submitted,

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